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No. 87-1284/2038; 87-1286/2072

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FRANCIS R. FITZSIMMONS and

ROGER TOWNE (Petitioners)

-vs-

UNITED STATES OF AMERICA (Respondent)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

Did the Sixth Circuit err when it affirmed Fitzsimmons' and Towne's RICO conspiracy conviction by permitting an invalidly-pleaded substantive RICO offense to serve as proof of Fitzsimmons' participation in the conspiracy?

Did the Sixth Circuit err when it required Fitzsimmons to establish that evidence obtained in violation of his Sixth Amendment rights was introduced at his trial?

Did the Sixth Circuit err when it failed to reverse Towne's conviction where it was shown that the Government had failed to disclose pre-trial to Towne exculpatory and useful to Towne's defense?

LIST OF PARTIES

Francis R. Fitzsimmons and Roger Towne are Petitioners in this proceeding. The United States of America is Respondent in this proceeding.

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Petitioners Francis R. Fitzsimmons and Roger Towne respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on February 26, 1991.

OPINION BELOW

The Opinion of the Court of Appeals for the Sixth Circuit below (Appendix, Volume VII, page 415 - Volume VIII, page 490) was not recommended for full text publication. The Opinions of the District Court for the Eastern District of Michigan below (Appendix, Volume V, page 320) were not reported.

JURISDICTION

The Order of the Sixth Circuit (Appendix, Volume VII, page 415) was entered on February 26, 1991. Fitzsimmons' Petition

for Rehearing and Rehearing En Banc was denied on April 22, 1991 (Appendix, Volume VIII, page 518). Towne's Petition for Rehearing and Rehearing En Banc, was denied on April 22, 1991. The jurisdiction of this Court is invoked under 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioners were prosecuted under 18 USC 1954 and 1962(c) and (d). The Fifth and Sixth Amendments of the United States Constitution and 18 USC 1961 are relevant to the Petition. The full text of all of the statutes and Amendments V and VI are contained in the Appendix, Volume II, pages 70-84.

STATEMENT OF THE CASE

The facts necessary to place in heir setting the questions raised in this etition are stated:

On September 19, 1986, in a cause hen pending in the United States District ourt for the Eastern District of Michigan, outhern Division, entitled United States of merica v Charles F. Collins, et. al., riminal Action 84-20715, Petitioner Francis Fitzsimmons was found guilty by a jury of he count of a substantive RICO offense Count I), one count of RICO conspiracy Count II) and one count of soliciting things f value in violation of 18 USC 1954 (Count . Co-defendant Roger Towne was found Not ilty of (Count I), the substantive RICO ffense, guilty of one count of RICO onspiracy (Count II) and one count of oliciting things of value in violation of 18 C 1954 (Count III).

The Defendant-Petitioners' trial lasted almost nine months. The 40-page Indictment alleged that certain defendants, including Petitioner Towne, gave or promised to give money or things of value to Petitioner Fitzsimmons and others who were associated with the Michigan Conference of Teamsters Welfare Fund in connection with the awarding of health care contracts by the Fund to certain companies which promoted or administered health care plans. The Indictment charged Towne and Fitzsimmons as follows: Count I (RICO substantive offense); Count II (RICO conspiracy); Count III (Towne only - 18 USC 1954); and Count V (Fitzsimmons only - 18 USC 1954). The allegations in Count V (as to Fitzsimmons) and Count III (as to Towne) were incorporated in the Count I RICO charge as the only racketeering act not barred by the five-year limit of prosecutions in 18 USC 3282. The allegations in Counts III and V were also alleged, in substance, in the Count II RICO conspiracy charge. Before

rial began, Fitzsimmons and Towne filed a
tion to dismiss Counts I, II, III and V
cause the allegations in Count V improperly
leged a violation of 18 USC 1954 as a
ntinuing offense. Fitzsimmons' and Towne's
etrial Motion to Dismiss was denied. In
s instructions to the jury on the RICO
nspiracy charge (Count II), the trial court
id:

> . . . The government satisfies its burden if it proves, beyond a reasonable doubt, either that the Defendant agreed to personally commit two acts of racketeering or that the defendant agreed that another would commit two acts of racketeering.

ppendix, Volume II, pages 96-97)

After his convictions, Fitzsimmons
d Towne filed a Motion for Arrest of
dgment as to Counts I, II and V (for

Fitzsimmons) and Counts II and III (as to Towne). The trial court granted Fitzsimmons' Motion for Arrest of Judgment as to Counts I and V and Count III as to Towne, because the Court concluded these Counts improperly alleged a continuing offense and were invalid (Appendix, Volume II, page 102). The conviction on Count I was arrested because the only predicate act alleged within the five-year limitations period was the Count V offense. Towne had been acquitted of count I by the jury. The trial court refused to vacate Fitzsimmons' and Towne's conviction for RICO conspiracy (Count II) even though the trial court's instruction to the jury on the elements of RICO conspiracy permitted the jury to find that Fitzsimmons and Towne agreed to participate in the RICO conspiracy if they found that Fitzsimmons and Towne agreed to commit the legally invalid offense alleged in Count V and Count III.

After Petitioners' Notice of Appeal had been filed with the Court of

peals for the Sixth Circuit, the Government tained an order to unseal and produced a anscript of a tape recorded statement of tzsimmons which had not been previously sclosed to the defense because of a etrial protective order. On the basis of e newly unveiled transcript, Fitzsimmons d Towne moved for a new trial because of olations of the Fifth and Sixth Amendments itzsimmons) or for an evidentiary hearing d for improperly failing to disclose culpatory and useful material. The trial urt certified that it would grant the tion for an Evidentiary Hearing and the xth Circuit remanded the case. The trial urt held a four-day evidentiary hearing.

After the evidentiary hearing, the ial court made findings of fact and nclusions of law (Appendix, Volume VI, page 1). The trial court determined that the vernment violated Fitzsimmons' Sixth endment right to counsel by permitting onard Schultz, a longtime confidential

informant for the FBI, to record a conversation between Fitzsimmons and Schultz in May 1985, after Fitzsimmons was indicted in this case and after his retained counsel had made an appearance. Schultz had become involved in narcotics trafficking and had been told by the Government that his cooperation would result in the amelioration of his own case.

The FBI gave emergency authorization for the clandestine recording upon a representation that Strike Force Attorney Keith Corbett had determined that no entrapment would result by the recording. At the evidentiary hearing, Corbett testified that he did not remember being asked about a Schultz-Fitzsimmons conversation. The trial court found that the FBI agent who discussed the matter with AUSA Corbett "either omitted or failed to make clear that the conversation would be between Schultz and Fitzsimmons" (Appendix, Volume VI, page 398).

The recorded conversation between ultz and Fitzsimmons lasted approximately hour. At the evidentiary hearing, ernment agents testified that they had tructed Schultz not to discuss the ictment or to recommend that Fitzsimmons ad guilty or approach the Government hout counsel. However, Schultz blatantly ored his alleged instructions and liberately elicited information from tzsimmons regarding the Indictment and tzsimmons' views of his own conduct.

Two days after this conversation was orded, a confidential source told an FBI nt that Fitzsimmons wanted to meet with without his attorney to discuss peration with the Government. The FBI nt told trial attorney AUSA John Newcomer nt Fitzsimmons' request for a meeting and informed Newcomer of the existence of the orded conversation. Newcomer then tened to the tape. Newcomer assumed that recording had been authorized by Strike

Force Attorney Corbett, but Corbett later told Newcomer that he knew nothing of the recording. In a written internal memorandum, AUSA Newcomer stated that he did not plan to use the tape at trial, except for possible impeachment should Fitzsimmons testify. Newcomer concluded the memorandum by stating, "[i]t is too late to isolate trial counsel from any taint that might accompany the existence of or knowledge of the statement of Fitzsimmons."

Newcomer submitted a Motion for a Protective Order, plus an Offer of Proof regarding the recorded conversation and the transcript on October 30, 1985, before trial began. On November 20, 1985, the Court ordered the transcript and recording sealed (Appendix, Volume II, page 99). The Court stated that the transcript and the recording would have been discoverable under FRCrP 16, but that the Protective Order was required by the "special circumstances" of the case.

As to Petitioner Towne, the Sixth Circuit concluded that as to Towne, some of the statements made by Fitzsimmons and tape recorded by Schultz, could be interpreted by a finder of the facts as attempts to explain the dealings with unindicted Coconspirator Brown and that the actions alleged to be taken by Towne were not criminal but as bona fide activities by Petitioner Towne (Appendix, Volume VII, page 465). The trial court made a finding that the tape itself may have been useful to both Towne and Fitzsimmons (Appendix, Volume VII, page 465). Towne's defense was that anything of value that may have been given was given after Fitzsimmons was no longer a trustee, had nothing to do with his position or action as a trustee and was given for a bona fide purpose. Towne had argued that things of value were given after Fitzsimmons was no longer working for the union, motivated by Fitzsimmons coming to work for Towne's company, because Fitzsimmons had substantial

connections with trade unions. His father was president of the entire Teamsters' Union. The surreptitious taped conversation had Fitzsimmons stating these things and confirming a noncriminal purpose as to activities by Towne. Fitzsimmons did not take the stand at his trial. Towne argued Fitzsimmons' words, on the previously described tape recording, were deprived of being presented into evidence by Towne, who had requested a severance on numerous occasions. The jury would have been able to weigh these words as they were exculpatory to Towne and consistent with Towne's total defense as to bona fide purpose and time of action. At the post-trial hearing, government counsel admitted that he wanted the flexibility to use the tape recordings in case Fitzsimmons did take the stand, to use the tape recording for whatever purpose. He did not want to be deprived of its (the tapes') usefulness. At the post-trial hearings the government conceded the tape

recording was "mildly" inculpatory as to Fitzsimmons. Towne's defense was the giving of things of value for a bona fide reason (Appendix, Volume VII, page 468).

Towne maintained the evidence on the tape as to him was admissible, exculpatory as to Towne, material, aided in the preparation of a defense, would have assisted in determinations as to Towne or other Co-Defendants taking the stand to aid in Towne's defense. Towne maintained that the evidence--the tape recording--was admissible under FRE 803(24), FRE 804(b)(3), as reliable and trustworthy evidence. The evidentiary hearing established that Fitzsimmons made these statements to the undercover government informant in private, seeking help or advice and with no knowledge that Fitzsimmons (the declarant) was being recorded.

After making findings of fact, the trial court concluded that Fitzsimmons' Sixth Amendment rights had been violated, but

denied Fitzsimmons a new trial. The trial court determined that Fitzsimmons had to show actual prejudice to be entitled to any remedy for the Sixth Amendment violation. Fitzsimmons then perfected his appeal to the Sixth Circuit.

The trial court concluded that, as to Towne, the failure to disclose the tape and provide its content did not violate **Brady** v **Maryland**, 373 US 83 (1963) and did not constitute a failure to disclose exculpatory material.

The Sixth Circuit upheld the trial court's denial of relief for the Sixth Amendment violation on the grounds that Fitzsimmons had failed to establish prejudice (Appendix, Volume VII, page 462). The Court of Appeals affirmed Towne's and Fitzsimmons' RICO conspiracy conviction on the grounds that "[e]ven though non-offenses, the acts alleged were sufficient to demonstrate that Fitzsimmons and Towne agreed to commit two racketeering acts" (Appendix, Volume VIII,

pages 485-86). Fitzsimmons' and Towne's Petition for Rehearing and Rehearing En Banc was denied on April 22, 1991 (Appendix, Volume VIII, page 518).

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit Erred When It Affirmed Fitzsimmons' and Towne's RICO Conspiracy Conviction By Permitting An Invalidly Pleaded Substantive RICO Offense To Serve As Proof Of Fitzsimmons' Participation In The Conspiracy.

A. The Sixth Circuit Ignored The Language of the RICO Statute And The Holding Of U.S. v Russell When It Permitted Allegations Which Did Not Charge Crimes To Serve As Proof Of A RICO Conspiracy.

The Sixth Circuit erroneously affirmed the Petitioners' RICO conspiracy conviction. The Sixth Circuit held that the invalid allegations in Count III (Towne) and Count V (Fitzsimmons), as substantially

aphrased in the RICO conspiracy count, ld serve as the basis of a finding that zsimmons and Towne agreed to participate the RICO conspiracy.

To sustain a RICO conspiracy viction, the Sixth Circuit requires proof t the Defendant agreed to the commission any two of the racketeering acts charged the indictment. **United States** v **Joseph**, F2d 549 (6th Cir, 1986), cert den 110 S 1816 (1990). In another petition, this rt has been asked to determine the ficiency of pleading of racketeering acts re the Indictment did not identify the ividual predicate acts which allegedly stituted the "pattern" of racketeering ivity required by 18 USC 1962(c). **United tes** v **Glecier**, 923 F2d 496 (7th Cir, 1), petition for certiorari filed May 31, 1. However, in this case, the Indictment eged specific racketeering acts against zsimmons and specific racketeering acts inst Towne, and the jury was instructed

that they could convict Petitioners of conspiracy if they found that either agreed to personally commit two acts of racketeering or that they agreed that someone else would commit two acts of racketeering.

In this case, the trial court granted arrest of judgment on Counts I, III and V. (Towne was acquitted of Count I before the jury.) The granting of arrest of judgment is based on the language of the Indictment, and not on any evidence adduced at trial. **United States** v **Sisson**, 399 US 267, 90 S Ct 2117, 26 L Ed 2d 608, 618 (1970). By granting arrest of judgment on Counts I, III, and V, the trial court determined that those counts did not charge crimes. The allegations in Counts III and V, which were restated in Count I and were paraphrased in the RICO conspiracy charge, did not state offenses. Acts which are not offenses cannot be racketeering acts in a RICO prosecution.

Under 18 USC 1961(1), an act of
cketeering activity" means "any act which
indictable" under certain criminal
visions of the United States Code and
te law. The Sixth Circuit adopted a
row and incorrect view, proffered for the
st time on appeal by the Government, of
arrested Count III and Count V charge:

> The government offers a narrower characterization. Although the predicate acts are technically not offenses because they are time-barred (or more appropriately invalidly pleaded continuing offenses in an attempt to defeat the time bar), they nonetheless are sufficient to demonstrate that defendant had agreed to participate in the

joint objectives of the conspiracy to perform two predicate acts. To the extent the jury relied on the actual acts alleged in those non-offenses, it relied on acts which were sufficient to demonstrate defendant's participation in the conspiracy. We agree with the latter characterization. Even though non-offenses, the acts alleged were sufficient to demonstrate that Fitzsimmons agreed to commit two racketeering acts. By agreeing to commit those acts, Fitzsimmons entered into the conspiracy.

(Appendix, Volume VIII, pages 485-86)

When the Sixth Circuit used the
rase "acts alleged in those non-offenses"
describe the allegations in the arrested
unts I and V, it clearly meant something
ss than indictable offenses. Only
dictable offenses may be alleged as
cketeering acts or predicate acts. In this
se, the Indictment failed to allege an
ndictable offense" in Count III and Count
That is why the trial court arrested
dgment on Count III and Count V. Count III
d Count V offenses were not racketeering
ts and should not have been considered by
e jury. The opinion is apparently based
on the questionable proposition that a RICO
nspiracy indictment need not allege all
ements of offenses charged as racketeering
ts. That proposition is contrary to the
ding in **Russell** v **United States**, 369 US
, 82 S Ct 1038, 8 L Ed 2d 240 (1962). An
dictment must allege at least the essential
ements of the offense charged, apprise the
fendant of what he must defend against and

permit a defendant to plead double jeopardy to bar his prosecution. **Russell**, at 764.

The Sixth Circuit adopted a constitutionally suspect and substantially lesser standard of proof of RICO conspiracy which violates the admonition in **Russell** v **United States**, **supra**, that an indictment must inform a defendant of the offense charged. The essence of a RICO conspiracy is the agreement to conduct the affairs of an enterprise through a pattern of racketeering activity. 18 USC 1962(c) and (d). The Sixth Circuit determined that circumstantial proof of an agreement was sufficient to sustain a RICO conspiracy conviction without regard to existence of the requisite racketeering activity. This analysis ignores the plain language of the RICO statute, the requirements of the Fifth Amendment and **Russell**, **supra**.

Furthermore, the Sixth Circuit's reliance on **United States** v **Persico** is misplaced. In **Persico**, the Court of Appeals

r the Second Circuit upheld RICO conspiracy
nvictions which relied on predicate acts
r which the defendants had been convicted
re than five years earlier. **United States**
Persico, 832 F2d 705, 714 (2nd Cir, 1987).
e defendants argued that the conduct for
ich they were convicted could not serve as
edicate acts because it occurred more than
ve years before their Indictment. The
cond Circuit held that the Government's
oofs established that the conspiratorial
reement continued until the filing of the
dictment and no limitations error occurred.
rsico, at 713. **Persico** did not address the
sue of the sufficiency of the allegations
the predicate acts charged in the
dictment.

B. The Sixth Circuit's Affirmation Of Fitzsimmons' and Towne's RICO Conspiracy Conviction Ignores This Court's Precedents And Conflicts With Decisions Of Other Circuits.

This Court has frequently held that a conspiracy charge and conviction are fatally defective where a conspiracy conviction is based upon allegations that the objects of the conspiracy were violations of criminal statutes, and the allegations fail to state an offense, and the jury may have premised the conspiracy conviction on conduct which is not criminal. **Stromberg** v **California**, 283 US 359, 51 S Ct 532, 75 L Ed 1117 (1931); **Leary** v **United States**, 395 US 6, 89 S Ct 1532, 23 L Ed 2d 57 (1960); **Chiarella** v **United States**, 445 US 222, 100 S Ct 1108, 63 L Ed 348 (1979); **Zant** v **Stephens**, 462 US 862, 103 S Ct @733, 77 L Ed 2d 235 (1982).

These precedents have been routinely followed by Courts of Appeals, including the Sixth Circuit: **Callanan** v **United States**, 881 F2d 229 (6th Cir, 1989) cert den 110 US 1816 (1990); **United States** v **Marcello**, 876 F2d 1147 (5th Cir, 1989); **United States** v **Mandel**, 862 F2d 1067 (4th Cir, 1988) cert den 469 US 862; **United States** v **Holzer**, 840 F2d 1343 (7th Cir, 1988); **Ingber** v **Enzor**, 841 F2d 450 (2nd Cir, 1988).

In this case, the jury was specifically instructed that the Government could prove either that Towne or Fitzsimmons personally agreed to commit two of the predicate acts alleged in the Indictment or agreed that someone else would commit two of those acts. The RICO conspiracy charge included allegations which paraphrased the allegations in the invalid Count III and Count V. The jury was allowed to consider the invalid allegations in determining whether Fitzsimmons agreed to participate in the alleged RICO conspiracy. A RICO

conspiracy requires the jury to find that the Defendant agreed to the commission of two of the predicate acts alleged in the Indictment. Joseph, supra.

When the trial court determined that Counts I, III and V were legally defective, it determined that an act of racketeering alleged against Fitzsimmons personally or Towne personally was legally insufficient. It also implicitly determined that subparagraphs 5 and 6 of the conspiracy count did not state legally-sufficient objects of the criminal conspiracy because subparagraphs 5 and 6 paraphrased defective Count V and defective Count III. Additionally, Towne had been acquitted of other alleged predicate acts in the substantive conspiracy by the jury.

It is clear from the convictions on Count I, Count III, and Count V that the jury did focus on the invalid allegations in Count III and Count V. The Count V offense (Fitzsimmons - 18 USC 1954 violation),

re-alleged in Count I as a racketeering act, was the only act in Count I within a period not barred within the statute of limitations. Without a finding that Fitzsimmons committed the Count V offense, the jury could not have found Fitzsimmons guilty of the RICO substantive offense alleged in Count I. Similarly, the parallel is true analyzing the content of Counts I, II and III as to Towne.

Furthermore, the record does not reveal any other alternative grounds for the jury's conspiracy conviction. It is a reasonable assumption that the conspiracy conviction on Count II was based on the convictions rendered in Counts V and I and, as to Towne, Count III. During its deliberations, the jury sent a note to the court clerk asking for clarifications as to the verdicts it could render on Counts II and III (Towne's 1954 substantive charge). In response to the trial court's inquiry, the jury indicated that it had already reached unanimous decisions on Counts I, IV, V, VI,

VII and VIII. Since the jury indicated that it had already reached verdicts as to Counts V and I at the time it sent its note to the trial court, it is reasonable to assume that convictions on Counts V and Count I formed the grounds for the jury's conviction of Fitzsimmons on Count II. Because Fitzsimmons may have been convicted of RICO conspiracy based on the legally-invalid allegations of Counts V and I, his conviction on Count II should be vacated. Similarly, analysis of Towne's acquittal of Count I and the legally invalid allegations of Count III establish that his conviction as to Count II should be vacated.

Stromberg, supra, has long held that a conspiracy charge and conviction must be set aside if some of the alleged objects of the conspiracy failed to state offenses and it is possible that the jury relied on the invalid charges in reaching its verdict. The jury may have relied on the invalid Count III, Count V and Count I as incorporated into

and substantially restated in Count II to convict Towne or Fitzsimmons of RICO conspiracy. Because Fitzsimmons was convicted by the jury on Count V and Towne on Count III, the obvious conclusion is that the jury convicted on the RICO conspiracy charge, based upon a finding that either had agreed to the commission of the racketeering acts restated from Count V or Count III into the conspiracy charge. There are no other substantive convictions which can be used to infer the basis of the jury's decision on Count II. Fitzsimmons RICO conspiracy conviction should be vacated. Towne's conspiracy conviction should be vacated.

II. The Sixth Circuit Erred When It Required Fitzsimmons To Establish That Evidence Obtained In Violation of His Sixth Amendment Rights Was Introduced At His Trial.

In **Cutillo et. al.** v **Cinelli**, this Court declined to grant certiorari to a petitioner who asked the Court to determine whether the burden of establishing prejudice from a Sixth Amendment violation rests on the defendant or the prosecution. **Cutillo, et. al.** v **Cinelli**, cert den, 485 US 1037 (1988), opinion below: **Cinelli** v **City of Revere**, 820 F2d 474 (1st Cir, 1987). Justice White dissented from denial of certiorari in **Cutillo**, **supra**, and cited **Cinelli**, the Sixth Circuit opinion in **United States** v **Steele**, **infra**, and the Third Circuit's opinion in **United States** v **Costanzo**, **infra** as establishing a conflict among the Circuits for which certiorari should be granted. Chief Justice Renquist and Justice O'Connor joined Justice White in his dissent. The Sixth Circuit's Opinion in Fitzsimmons establishes that the conflict in the circuits remains unresolved and requires resolution by this Court.

A. The Sixth Circuit Misinterpreted This Court's Holdings in **Weatherford** v **Bursey**, 429 US 545 (1977) and **U. S. v Morrison**, 449 US 361 (1981) And Its Own Precedent In **U. S. v Steele**, 727 F2d 580 (1984).

The Fitzsimmons' opinion concluded
t, even though there had been a Sixth
ndment violation based upon the
entional elicitation of information from
zsimmons through the use of a confidential
ormant and communication of the
ndestine information to the prosecution
t the investigating agents, there was no
is for a new trial because no prejudice was
wn (Appendix, Volume VII, page 462). This
ding misinterprets **Weatherford** v **Bursey**,
US 545, 97 S Ct 837, 51 L Ed 2d 30 (1977)
United States v **Morrison**, 449 US 361, 101
665, 66 L Ed 2d 564 (1981) and misapplies
Sixth Circuit's analysis in **United States**

v **Steele**, 727 F2d 580 (6th Cir, 1984) **cert den**, **Scarborough** v **United States**, 467 US 1209 (1984). Neither **Weatherford**, **Morrison**, nor **Steele**, require that a showing of actual prejudice must be made before a remedy for a Sixth Amendment violation will be tailored.

In **Weatherford**, **supra**, this Court agreed that there was no Sixth Amendment violation based upon trial court's findings of fact that **Weatherford** had not discussed with or passed on to the prosecution information concerning **Bursey's** trial plans or strategy or anything having to do with the defense. 429 US at 554. This Court noted that **Bursey's** claim of violation would have been stronger if, inter alia, "those overheard conversations [had] been used in any other way to the substantial detriment of **Bursey** . . ." Id., at 545.

In **Morrison**, **supra**, this Court assumed that a Sixth Amendment violation had occurred, 449 US at 364. The **Morrison** holding was specifically limited to the

stion of dismissal of the Indictment as an
ropriate remedy. **Morrison** did not require
howing of actual prejudice. This Court
ely held that the Third Circuit's
missal of the indictment was
appropriate" and "drastic" where no
judice was pled or shown. 449 US at 367.

The Sixth Circuit's determination
t there must be some direct use of the
ormation obtained from Fitzsimmons
interprets **Weatherford**, **supra**.
therford requires only a finding that
re is "at least a realistic possibility of
ury to [the defendant] or benefit to the
te." 429 US at 558. **Weatherford** does not
uire a showing of actual use of the
endant's surreptitiously obtained words as
dence at trial. The question is whether
"overheard conversations have produced,
ectly or indirectly any of the evidence
ered at trial." Id. at 552 (emphasis
ed). This view is consistent with the
gestion in **Morrison**, **supra**, that a new

trial may be an appropriate remedy to remove the taint of information obtained by the government in violation of a defendant's Sixth Amendment rights. This Court has also held that a new trial is the most appropriate means of affording a defendant an opportunity to protect himself from the use of evidence obtained in violation of the Sixth Amendment even when the evidence might otherwise be inadmissable. **Black** v **United States**, 385 US 26 (1966); **O'Brien** v **United States**, 386 US 345 (1967).

The Fitzsimmons panel was not bound by the Sixth Circuit's prior holding in **United States** v **Steele**, 727 F2d 580, cert den sub nom **Scarborough** v **U. S.**, 467 US 1209 (1984). In **Steele**, there was no tainted information, no communication to the prosecution, no purposeful intrusion and no Sixth Amendment violation. The **Steele** panel did not reach the issue of what prejudice must be shown before a remedy would be

anted because the Sixth Circuit determined
at no constitutional violation occurred.

Here, the Sixth Circuit concluded
at Schultz and Fitzsimmons did not discuss
fense matters. However, most of their
nversation did relate to the pending
arges against Fitzsimmons. After a four
y evidentiary hearing and a review of
pposed findings of fact and law submitted
the parties, the trial court found that
e majority of the conversation between
tzsimmons and Schultz related to the
dictment. The trial court also found,
ting **Kuhlmann** v **Wilson**, 477 US 436, 477
986), that the information obtained from
tzsimmons was deliberately elicited by the
e of a highly experienced confidential
formant who had a substantial incentive to
oid his own serious drug charges. The
al court stated, "without a doubt, Schultz
ok some action beyond mere listening that
s designed deliberately to elicit
criminating remarks" (Appendix, Volume VI,

page 389). The Schultz-Fitzsimmons conversation on May 1, 1985, lasted more than an hour. Schultz led Fitzsimmons through a discussion of the nature of the charges and Fitzsimmons' view of the facts relating to his case as well as his potential defenses. Fitzsimmons was led to relate his views of his conduct and the charges against him. Fitzsimmons' views were obviously formed after consultations with his attorney over the months after his arraignment.

After listening to the recording of the Schultz-Fitzsimmons conversation, the FBI agent in charge of the Fitzsimmons investigation was of the view that the tape recorded evidence was damaging to the defendant and highly important to the government. Within three weeks of the recording, the prosecutor listened to the tape, discussed it with the case agent and wrote to his superior at the Department of Justice that "it is too late to isolate trial

unsel from any taint which might accompany
e existence or knowledge of the recorded
atements of Fitzsimmons." The Government
en proceeded with its trial and witness
eparations.

At the evidentiary hearing, AUSA
d trial attorney Newcomer testified that
e tape clearly established what Fitzsimmons
d his retained counsel thought of the
iminal charges. These ingredients were not
esent in **Weatherford**. Based upon the
ctual findings of the trial court below,
ere is in this case a "realistic
ssibility of injury to the defendant or
nefit to the state." **Weatherford**, **supra**.

The Sixth Circuit concluded that
e prosecutor's misconduct had not
ejudiced Fitzsimmons. However, neither the
al court nor the Sixth Circuit addressed
zsimmons' argument that the prosecutor's
sconduct had violated the rules of conduct
plicable to Government attorneys. The
th Circuit acknowledged its supervisory

authority to remedy prosecutorial misconduct, but ignored Fitzsimmons' alternative grounds for relief.

Model Code of Professional Responsibility DR 7-104(A)(1) provides that an attorney shall not "communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so."

The United States District Court for the Eastern District of Michigan has adopted the Rules of Professional Conduct for the State of Michigan as the guidelines for attorneys before that Court. Rule A-4, Local Rules of Eastern District of Michigan. In 1985, when the clandestine recording was made, the Code of Professional Responsibility for the State of Michigan included CPR 7-104, which is identical to DR 7-104 of the Model Code. This rule applies to federal

prosecutors. **United States** v **Hamad**, 846 F2d 854 (2nd Cir, 1988), cert den, 111 S Ct 192; ABA Standards Relating to the Administration of Criminal Justice, Standard 3-4.1 (commentary).

The tape recording was not an isolated instance of contact by the prosecution with Fitzsimmons without notice or consent of Fitzsimmons' counsel. Within weeks of the recording, the prosecutor attempted to engage Fitzsimmons in discussions aimed toward a plea resolution of the case without the involvement of Fitzsimmons' retained counsel. These actions clearly violate the rules of conduct which apply to all counsel, but which should have compelling application to prosecutors. The Court's supervisory power exists to protect the integrity of the judicial process and to deter government misconduct. **United States** v **Hasting**, 461 US 499 (1983). The use of an informant first to deliberately elicit information relating to the pending

indictment, followed by the use of another informant to attempt to engage Fitzsimmons in plea negotiations without his counsel, violated the then applicable section of the Michigan Code of Professional Responsibility, DR7-104(A)(1) and Standard 3-4.1(b) of the ABA Code of Professional Responsibility. These rules prohibit contact by counsel with an opposing party to litigation who is represented by counsel. The Sixth Circuit erred when it ignored the clear evidence of the prosecutor's repeated violations of disciplinary rules.

B. The Sixth Circuit's Opinion Conflicts With Opinions Of The Third Circuit, The Court Of Appeals For The District Of Columbia And The First Circuit.

The Sixth Circuit's determination that Fitzsimmons must show actual prejudice to obtain relief for the Government's deliberate violation of his rights conflicts with the holding of the Court of Appeals for the Third Circuit in **United States** v **Levy**, 577 F2d 200 (1978). The Third Circuit has rejected an analysis of remedies for Sixth Amendment violations which require the defense to show actual prejudice. The Third Circuit expressed concern over the trial court's ability to determine prejudice to the defense occasioned by a knowing invasion of the attorney-client privilege and the disclosure of confidential information to the Government:

> . . . [W]e think that there are overwhelming considerations mitigating against the standard which tests the Sixth Amendment violations by weighing how prejudicial

to the defense the disclosure is. . . [i]t is highly unlikely that a court can, in such a hearing, arrive at a certain conclusion as to how the Government's knowledge of any part of the defense strategy might benefit the Government in its further investigation of the case, in the subtle process of pretrial discussion with potential witnesses, in the selection of jurors or in the dynamics of trial itself . . . [t]he Sixth Amendment violations might be disclosed, if at all, late in the trial or after the trial has been

completed. At that point, the trial court applying an actual prejudice test would face the virtually impossible task of re-examining the entire proceeding to determine whether the disclosed information influenced the Government's investigation or presentation of its case or harmed the defense in any other way. **Levy**, supra at 208.

The Third Circuit also considered and rejected analogies to remedies for Fourth Amendment violations as failing to protect the broader concerns of the Sixth Amendment:

> We think that the inquiry into prejudice must stop at the point where

> attorney-client confidences are actually disclosed to the government enforcement agencies responsible for investigating and prosecuting the case. Any other rule would disturb the balance implicit in the adversary system and thus would jeopardize the very process by which guilty and innocence are determined in our society. **Levy**, **supra** at 209.

The Third Circuit rejected the inference that **Weatherford** v **Bursey**, **supra**, required a separate showing of prejudice for relief after actual disclosure of confidential information occurred. **Levy** at 210. Again citing the policies implicated by

ne Sixth Amendment, the Third Circuit
oncluded that **Weatherford** did not "lay down
ne rule" that additional prejudice beyond
ctual disclosure must be shown. Id. The
ird Circuit has reaffirmed its position in
nited States v **Costanzo**, 740 F2d 251 (1984),
ert den, 105 S Ct 3477 (1985).

The Sixth Circuit's opinion also
nflicts with the holding of the Court of
peals for the District of Columbia in
iggs v **Goodwin**, 698 F2d 486, 493 (DC Cir,
83), cert den, 104 S Ct 104 (1984). Citing
United States v **Morrison**, **supra**, the
iggs Court stated that the amount of
ejudice to be shown before a remedy will be
anted need not require a showing that the
tual outcome of the trial was affected.

The Sixth Circuit's holding in
tzsimmons also conflicts with the approach
the First Circuit, which shifts the burden
proof to the prosecution once the
fendant establishes a prima facie case of

prejudice resulting from the violation of his Sixth Amendment rights. **Cinelli** v **City of Revere**, 820 F2d 474 (1987), cert den sub nom **Cutillo, et. al.** v **Cinelli**, 485 US 1037 (1988).

III. The Petitioner Towne's Conviction On Count II, RICO Conspiracy, Should Be Reversed Because The Government's Improper Conduct And The Ultimate Deprivation Of A Secretly Made Tape Recording Constituted A Denial Of Fair Trial And Violated Principles Set Down By This Court In **Brady v Maryland**, 373 US 83 (1963), And Its Progeny As The Tape Recording Contained Material That Was Exculpatory As To Towne And/Or Would Have Greatly Aided In The

Presentation And Preparation

Of His Case.

The Petitioner Towne's trial was
rejudiced by the Government's failure to
isclose the secret tape recording of
itzsimmons made by the Government Informant
chultz. He did not receive a fair trial or
onstitutional Due Process within the meaning
United States v **Agurs**, 427 US 97 (1976).
me of the words spoken by Fitzsimmons on
e tape recording, made after the Indictment
Fitzsimmons and Towne but prior to trial,
re exculpatory as to the Petitioner Towne.
rtainly these words went to the heart of
wne's defense. The actions by the
vernment and the unavailability of the
idence, exculpatory and useful to the
fendant in preparation and conduct of his
fense at trial constitute a Due Process
olation and his conviction must be
versed. **Brady** v **Maryland**, 373 US 83
963).

The gravamen of the only count to which Towne stands convicted is centered in the intent and purpose for Towne giving things of value to Fitzsimmons. 18 USC Section 1954 makes it a crime only if the things of value were given to influence the actions, decisions and duties of Fitzsimmons related to his ERISA function, when he was Trustee of the Teamsters Welfare Fund.

Towne's defense maintained that his purpose was bona fide, not criminal. Whatever was given to Fitzsimmons was not at a time when he was Trustee, nor were his actions as a Trustee--but at a later time--after Fitzsimmons had long resigned his position as Trustee. It was for the purpose of getting Fitzsimmons to come to work for a company associated with Towne if such employment were to be allowed.

The trial court conceded (at a post-trial hearing) that the tape itself may have been useful to the Defendant (Appendix, Volume VII, page 465). Additionally, the

al court conceded that the recorded words
Fitzsimmons as to Towne contained
planations that the dealings of Fitzsimmons
h Towne were bona fide (Appendix, Volume
, page 468).

The Petitioner Towne maintains the
ions of the Government in suppressing the
e and therefore making unavailable words
Fitzsimmons that exculpate Towne are part
the Due Process violation and the denial
him of a fair trial. The Government, in
ting the trial court's Protective Order
pressing the tape recording from pre-trial
covery and its use by Petitioner, resorted
repeated false representations to the
al court. This is a conclusion reached by
trial court (Appendix, Volume VI, pages
-398).

The deprivation of exculpatory and
ful material, when reviewed in the context
the control of 18 USC 1954 offenses
ablishes that had the evidence been
closed, there is a reasonable probability

that the result of the proceedings would have been different. **United States** v **Bagley**, 473 US 667, 182 (1985).

The actions of the Government and misuse of the trial court in obtaining the Protective Order (an Order that also held that the tape recording was FRCrP 16 material (Appendix, Volume II, pages 100-101) was the equivalent of conduct frowned upon in earlier Court of Appeals' decisions. Prior statements, given by a witness (herein potential words of witness/co-defendant Fitzsimmons) made unavailable due to the wrongful conduct of a party (in the instant matter the Government obtaining in a false manner the Protective Order), is admissible against the party, where the statements would have been admissible had the witness been available to testify on behalf of the Petitioner; e.g., **Steele** v **Taylor**, 684 F2d 1193 (6th Cir, 1982). The Government made Fitzsimmons unavailable, knowing he is charged as a co-defendant. They wrongfully

posed a severance and deprived Towne of the
e-trial use or knowledge of Fitzsimmons'
rds on the tape recording that contained a
na fide purpose as to receipt of things of
lue from Towne. The reason for reversal of
conviction under such Government conduct is
sed in part on public policy recognition by
courts that protects the integrity of the
versary process. The protection deters
tigants from acting on strong incentives to
owingly make unavailable adverse testimony
vidence) on a principle of reciprocity
nilar to the equitable doctrine of clean
nds. This principle applies to the
vernment as a party to litigation. **Steele**
Taylor, **supra**. It cannot be lost upon the
rt that the Government made the secret
e of Fitzsimmons unavailable to Towne
rough its unnecessary and falsely
resented need for the Protective Order.

The portion of the tape transcribed
part of the record (Appendix, Volume III,
es 183-190) established Fitzsimmons

commenting on the innocent reason for receipt by his wife of a job and some Eleven Thousand Dollars. Fitzsimmons stated he was not working for the union at the time. He was not at ERISA employee or Trustee of the Fund at the time of receipt. Receipt of things of value from Towne had nothing to do with the union. They were interested in future connections with Fitzsimmons' father. The things of value and purpose with respect to time and date were in December of 1981--long after Fitzsimmons had resigned as a Trustee of the Fund. It was claimed this was bona fide compensation.

The jury had trouble as to Petitioner Towne. He was acquitted of the RICO substantive count containing predicate acts of giving for an unlawful purpose. The bona fide purpose as to Fitzsimmons' words spoken to the Informant and secretly recorded were crucial and important. They go to the reasonable probability that the outcome may

have been different. **United States** v **Bagley**, **supra**, page 50.

The trial court, in its post-trial opinion, by implication **seems** to accept the admissibility of the taped words of Fitzsimmons (Appendix, Volume VI, page 401-402). However FRE 803(24) provides that the taped words of the unavailable Fitzsimmons (a co-defendant, who did not take the stand and could not be compelled to do so; a severance was not allowed Towne and Towne knew nothing of the tape recording) were admissible evidence at trial. Intent was key to Towne's charges. **United States** v **Popenas**, 780 F2d 545 (6th Cir, 1985) provides guidance on the issue. Here the taped words as to Towne: (a) would be offered as evidence of a material fact--probative of a bona fide intent; (b) the circumstances had guarantees of trustworthiness, including some things Fitzsimmons said as inculpatory to Fitzsimmons; (c) admissibility was consistent with the interest of justice; (d) lastly,

there was no way notice of intent to offer the taped statement of Fitzsimmons could be given as Towne had no pre-trial knowledge of its existence. See also **United States** v **Puglisi**, 740 F2d 240 (2nd Cir, 1986) (dicta court condemns the structure of a trial and activity used by the Government to keep out evidence that was relevant and material to a defense).

The instant matter troubled the jury as to Towne. They split on their verdict, acquitting Towne of the RICO substantive offense! A reasonable doubt could be found and the result, had the hidden evidence been presented or the Petitioner allowed the use for the preparation of his defense; i.e., taking the stand, support for a severance, getting Fitzsimmons to take the stand; produces under a fair interpretation of **Brady** and **Bagley**, **supra**, at pages 46 and 50 and page, that the outcome would have been different. If fair trials, constitutional protections and procedural rules promoting

fairness are to have real meaning, the sole conviction, RICO conspiracy, on the single count the Petitioner Town has set against him, should be reversed by this Honorable Court.

CONCLUSION

Fitzsimmons' and Towne's RICO conspiracy convictions were affirmed on the basis that proof of an agreement to commit acts which are not crimes is sufficient to establish participation in a RICO conspiracy. Fitzsimmons was denied any relief for the Government's deliberate violations of his right to counsel because the lower courts required him to show that the Government made direct use of the clandestine tape recordings at Fitzsimmons' and Towne's trial. Both of these decisions are erroneous. Further, Towne was denied a fair trial. The Government improperly failed to disclose exculpatory and useful evidence that violated

Constitutional and procedural protections that require the reversal of Towne's conviction. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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